71

Office - Supreme Court, U. S.
FILED
MAY 12 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1951.

No. 762

ROBERT B. OLSEN,

Petitioner,

—against—

ARABIAN AMERICAN OIL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

GUY O. WALSER,
Attorney for Petitioner,
91 East Main Street,
Bay Shore, N. Y.

SORENSON & MILLER,
Of Counsel.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

INDEX.

	PAGE
The Opinions of the Courts Below	2
Jurisdiction	2
Statutes Involved	2
The Questions Presented	2
Summary Statement of the Matter Involved	3
Specification of Errors	5
Reasons Relied on for the Granting of the Writ	5

TABLE OF CASES CITED:

Carter v. *Bradlee, et al.*, 280 N. Y. S. 368, 245 App. Div. 49, aff'd 269 N. Y. 664 ..... 5, 6

Crawford v. *Mail & Express Co.*, 163 N. Y. 404 .....10, 11

Moran v. *Standard Oil Co. of New York*, 211 N. Y. 187 .....7, 8, 9, 10

Reiss v. *Arabian American Oil Company*, 107 N. Y. S. 2nd 907, reversing 109 N. Y. S. 2nd 625 .....11, 12

Twentieth Century-Fox Film Corp. v. *Screen Pub. Guild*, 78 N. Y. S. 2nd 178 (not otherwise reported) 10

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1951.

No. .

ROBERT B. OLSEN,

Petitioner,

—against—

ARABIAN AMERICAN OIL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Robert B. Olsen, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above cause on February 13, 1952, affirming the order of the District Court for the Eastern District of New York dismissing the complaint on motion for

summary judgment and from the judgment entered thereon, and respectfully represents:

The Opinions of the Courts Below.

The opinion of Byers, District Judge, appears in the record at pages 36 to 41, and the opinion of the Court of Appeals for the Second Circuit appears in the record at pages 47 to 50.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

(2) The judgment of the Court of Appeals for the Second Circuit affirming the judgment of the District Court was entered on February 13, 1952, and judgment thereon entered in the United States District Court for the Eastern District of New York on March 19, 1952.

Statutes Involved.

There are no statutes involved.

The Questions Presented.

The sole question involved is whether the District Court and the Court of Appeals have correctly interpreted the contract between the parties in accordance with the controlling law of the State of New York.

Summary Statement of the Matter Involved.

The petitioner, Robert B. Olsen, was employed as an airplane pilot by the respondent, Arabian American Oil Company, pursuant to a written contract made in the State of New York dated October 15, 1947. Under the terms of this contract the petitioner agreed to serve for a minimum of thirty months in the zone of the company's operations abroad in Saudi Arabia. It is admitted by the respondent that its aircraft were licensed by the Civil Aeronautics Authority of the United States Government, and it is maintained by petitioner that the CAA jurisdiction over such licensed aircraft is worldwide. The petitioner is prepared to prove that the respondent violated, on numerous occasions, the rules and regulations, particularly safety regulations of the Civil Aeronautics Authority and that when he complained of these violations to his superiors, he was given a kangeroo hearing, reported by them to the home office as a trouble maker, and discharged pursuant to clause "b" of the contract.

Clauses "a" and "b" of the contract read as follows:

> "a You will be summarily dismissed, without notice and without return transportation and traveling expenses, for conduct which, in the opinion of the Management, would be detrimental to the best interests of the Company, for wilful neglect of duties, or for noncompliance with regulations;
>
> "b The Company may terminate your services for any other reason after departure from the continental United States upon payment of

minimum return transportation and traveling expenses, salary for normal travel time to place of recruitment, and upon payment of a sum equivalent to a minimum of four weeks basic salary."

The last paragraph of the contract states:

"Your application for employment, together with this letter of agreement, constitute the terms of your employment by this Company."

The application for employment contains the following printed paragraph:

"Should I be given employment by you, either the position applied for, or some other, now or hereafter, I hereby agree that such employment may be terminated by you at any time, without liability to me for wages or salary except such as may have been earned at the date of such termination."

The respondent relies upon the above provisions in the contract and application for employment, and maintains that clause "b" permits the respondent employer to "buy out", so to speak, the contract of the petitioner. That is to say the contract was for a definite period and the respondent did not have the right to terminate it before the end of that period without any payment whatsoever. The respondent contends that it did have the right to terminate the contract before the end of the period upon making said payments and it is conceded that the respondent did make those payments.

The petitioner contends, on the other hand, that the fair meaning of clause "b" is that the respondent could terminate the contract under clause "b" only so long as such action on the part of respondent was based on a justifiable view on its part had in good faith that it would be benefited thereby.

Specification of Errors.

The Court of Appeals for the Second Circuit erred: (1) in not reversing the judgment below as being not in accord with the prevailing law of the State of New York on the question of the proper interpretation of the contract; (2) in affirming the judgment of the District Court; and (3) in denying petition for a rehearing.

Reasons Relied on for the Granting of the Writ.

The Courts of the State of New York have repeatedly held that a clause in a contract relating to the termination of the employment prior to a certain date "for any cause" or "for any reason" must be read as a cause or reason which would justify the employer in terminating the contract for a breach thereof by the employee and not arbitrarily. Justice O'Malley, Justice of the Supreme Court, Appellate Division, First Department, writing the opinion in the case of *Carter* v. *Bradlee, et al.*, 280 N. Y. S. 368, 245 App. Div. 49, decided June 14, 1935, and affirmed by the Court of Appeals, 269 N. Y. 664, said as follows:

> "This contract, however, contained the following provision. 'This Agreement is made for two years from November 1st, 1925, but it is under-

stood and agreed that we retain the right to terminate the Agreement and to discharge you at any time should we feel called upon to do so for any reason.'

"It is contended by the defendants that the trial justice properly decided that under the foregoing provision the plaintiff could be discharged at any time. We adopt a different view. Such a construction would make the contract merely one at the defendant's will, though by its terms it was for two years. A construction will not be given to a contract, if possible, that would place one of the parties at the mercy of the other, *Simon* v. *Etgen, et al.*, 213 N. Y. 589, 107 N. E. 1066. Under the clause in question, we are of the opinion that any discharge before the expiration of a year should have some 'reasonable' ground and that the reason must be attended with good faith. *Industrial & General Trust* v. *Tod*, 180 N. Y. 215, 73 N. E. 7; *Schoellkopf* v. *Coatsworth*, 166 N. Y. 77, 59 N. E. 710; *Parsil* v. *Emery*, 242 App. Div. 653, 272 N. Y. S. 439; *Vogel* v. *Pathe Exchange, Inc.*, 234 App. Div. 313, 254 N. Y. S. 881; *Sullivan* v. *Frazier*, 40 App. Div. 288, 57 N. Y. S. 1008.

"See also *Summers* v. *Colver*, 56 N. Y. S. 624, 38 App. Div. 553; *Gutner* v. *Success Magazine Corp. et al.*, 242 N. Y. S. 679, 136 Misc. 257; *Diamond* v. *Mendelsohn, et al.*, 141 N. Y. S. 775, 156 App. Div. 636; *Studner* v. *H & N Carburetor Co., Inc.*, 172 N. Y. S. 836, 185 App. Div. 131; aff'd 230 N. Y. 534; *Zitlin* v. *Max Heit Dress Corp.*, 271 N. Y. S. 275, 151 Misc. 241."

We also quote Judge Cardozo from the opinion in *Moran* v. *Standard Oil Co. of New York,* 211 N. Y. 187 at page 196:

> "The trial judge held that the contract imposed no obligation on the defendant to employ the plaintiff for five years, and that at the defendant's option it was terminable at will. We cannot accept that construction of its meaning. An intention to make so one-sided an agreement is not to be readily inferred, *Sanford* v. *Brown Brothers Co.,* 208 N. Y. 90, 101 N. E. 797. The contract was drawn by the defendant's lawyers, and was tendered to the plaintiff with the assurance, as he says, that his future for the next five years would be secure. Since the language is the defendant's, we must construe it, if its meaning is doubtful, most favorably to the plaintiff. *Gillet* v. *Bank of America,* 160 N. Y. 549, 555, 55 N. E. 292; *Marshall* v. *Com'l Tr. Mut. Acc. Ass'n,* 170 N. Y. 434, 63 N. E. 446. We must also give its words the meaning which the defendant ought reasonably to have understood that the plaintiff would put upon them. *White* v. *Hoyt,* 73 N. Y. 505, 511; *Nellis* v. *Western Life Indemnity Co.,* 207 N. Y. 320, 332, 334, 100 N. E. 1119. When these canons of construction are remembered and applied, we must conclude that the plaintiff believed, and had the right to believe, that the period of five years was to be the term of employment as well as the term of service. Looking at the writing tendered to him, he found that he was binding himself to sell for five years, for and on account of the defendant, certain paints, oils, and varnishes, a list of which was attached. He could not sell them unless the defendant fur-

nished them. If he had any doubt as to the defendant's duty to furnish them, it must have been dispelled by the words that followed: 'The party of the second part hereby agrees to pay the party of the first part commissions on sales of said goods to be made as follows.' The defendant did not merely accept the plaintiff's promise to serve it for five years by the sale of its goods; it agreed to pay him commissions 'on sales of said goods,' and spoke of them as sales 'to be made.' The plaintiff must have understood this as meaning that the defendant would do its part in permitting them 'to be made.' It could not do that part unless it filled the orders which he reported. Note also that the writing in its opening words is described as an agreement, and that the engagements of each party are couched in terms of agreement, and not merely of promise. The plaintiff 'agrees' to serve for five years. The defendant 'agrees' to pay him at certain rates. The very word 'agreement' connotes a mutual obligation. *Benedict* v. *Pincus,* 191 N. Y. 377, 383, 384, 84 N. E. 284. There may be a 'promise' to serve without a promise to employ, but there can be no 'agreement' for service without mutuality of rights and duties. *Richards* v. *Edick,* 17 Barb. (N. Y.) 260, 263; *Baldwin* v. *Humphrey,* 44 N. Y. 609, 615. 'If it be *agreed* between A. and B. that B. shall pay A. a sum of money for his lands, etc. on a particular day, these words amount to a covenant by A. to convey the lands, for *agreed* is the word of both.' *Pordage* v. *Cole,* 1 Saund. 319h, quoted in *Baldwin* v. *Humphrey, supra.* So, in *Richards* v. *Edick, supra,* where the covenant read, 'The aforesaid party of the first part agrees to sell

his farm in Florence, etc., to the party of the second part, for and in consideration of seventeen hundred dollars,' the court held that the word 'agreement' necessarily imported two parties, one to sell and one to buy. 'It was not merely a promise made by one party to the other, but it was an agreement made by both and binding on both by every principle of law and morality applicable to the construction of contract.' *Richards* v. *Edick, supra.* These words are equally applicable to the contract before us. Just as the plaintiff impliedly undertakes to serve at the rates which the defendant 'agrees' to pay, so the defendant impliedly undertakes to accept for the designated term the service which the plaintiff 'agrees' to render.

"The law, in construing the common speech of men, is not so nice in its judgments as the defendant's argument assumes. It does not look for precise balance of phrase, promise matched against promise in perfect equilibrium. It does not seek such qualities even in written contracts, unless, perhaps, the most formal and deliberate, and least of all does it seek them where the words are chosen by the master under legal advice, and accepted by the servant without the aid of like instruction. There are times when reciprocal engagements do not fit each other like the parts of an indented deed, and yet the whole contract, as was said in *McCall Co.* v. *Wright,* 133 App. Div. 62, 68, 117 N. Y. Supp. 775, may be 'instinct with an obligation,' imperfectly expressed. If the defendant meant the plaintiff to understand that it had a right to discharge him at pleasure, it could easily have said so in words too clear

for misconstruction. We think it did not say so, but by implication said the contrary. The law governing this subject was stated recently and with admirable lucidity by Vann, *J.* Writing for the court in *Grossman* v. *Schenker,* 206 N. Y. 466, 100 N. E. 39. That case, and others illustrating the same principle, justify the conclusion that the plaintiff's obligation to serve and the defendant's to employ were correlative and equal. *Jacquin* v. *Boutard,* 89 Hun 437, 35 N. Y. Supp. 496, affirmed on opinion below 157 N. Y. 686, 51 N. E. 1091; *Baker Transfer Co.* v. *Merchant's R. & Ice Mfg. Co.,* 1 App. Div. 507, 37 N. Y. Supp. 276; *Ellis* v. *Miller,* 164 N. Y. 434, 58 N. E. 516; *City of N. Y.* v. *Paoli,* 202 N. Y. 18, 94 N. E. 1077; *Genet* v. *D & H C Co.,* 167 N. Y. 608, 60 N. E. 1111; *Emmens* v. *Elderton,* 4 H. L. C. 624; *Hudson Canal Co.* v. *Penn. Coal Co.,* 8 Wall. 276, 289, 19 L. Ed. 349."

In its affirmance the Court of Appeals relied in the main upon the two New York cases of *Twentieth Century-Fox Film Corp.* v. *Screen Pub. Guild,* 78 N. Y. S. 2nd 178 (not otherwise reported), and *Crawford* v. *Mail & Express Co.,* 163 N. Y. 404.

In the first case, at page 180, the agreement as to clause 10 went into great detail with respect to the discharge of an employee for causes other than drunkenness, dishonesty or insubordination, and left it to the discretion of the employer to discharge for business or economic reasons. In the case at bar, clause (b) states merely, with respect to cause for discharge that "(b) The Company may terminate your services for any other reason."

In the *Crawford* case, *supra,* the offering letter contained a clause to the effect that

> "my services shall be satisfactory to the publishers, and in case they are not, I shall be entitled to one week's salary".

By a four to three decision, the New York Court of Appeals held it to be a case of that type

> "in which contracts are made to gratify taste, to serve personal convenience or individual preferences".

On January 22, 1952, which was exactly six days after the argument of the appeal herein, the opinion of the Appellate Division of the State of New York, in the case of *Reiss* v. *Arabian American Oil Company,* 107 N. Y. S. 2nd 907, reversing 109 N. Y. S. 2nd 625, was reported in the New York Law Journal.

This case concerned the construction of the precise contract and the precise clause "b" as in the instant case. Therein the Appellate Division, Second Department, in reversing the judgment and verdict of the Court below, decided that the respondent did have a reason for discharging the petitioner under the provisions of that clause. Such a condition does not obtain in the case at bar, because no question of fact has been formally brought to the attention of this or any other Court to indicate any valid reason for the discharge of the petitioner.

The opinion of the Appellate Division in the said case reads as follows:

> *"Reiss, res,* v. *Arabian Am. Oil Co., Ap*—In an action to recover damages for alleged wrongful

discharge of plaintiff as an employee of the defendant, defendant appeals from a judgment in favor of plaintiff rendered after trial. Judgment reversed on the law and the facts, with costs, and complaint dismissed, with costs. The written contract of employment was for work to be performed in Saudi Arabia and other foreign locations; and the contract provided that plaintiff would be dismissed without compensation for transportation and traveling expenses back to this country for certain specifically stated conduct on his part and, further, in what has been characterized as clause (b), that the defendant would have the right to terminate his services 'for any other reason' upon payment of such return transportation and traveling expenses plus salary for normal travel time for such return and a sum equivalent to four weeks' basic salary. The defendant terminated plaintiff's services in reliance on said clause (b), and made the payments therein provided. In our opinion, clause (b) invested defendant with the right to terminate the services even though plaintiff had not himself breached the contract, so long as such action on the part of defendant was based on a justifiable view on its part, had in good faith, that it would be benefited thereby. The undisputed evidence of friction between plaintiff and Arab workmen, representatives and officials, and between plaintiff and other Americans on the site, compels the conclusion that the defendant terminated the contract with good faith and in accordance with the provisions of clause (b)."

On the basis of this decision, petitioner requested a rehearing of the appeal which petition for rehearing

was denied on March 5, 1952. In view of the fact that Judge Augustus Hand, writing the opinion for the Court of Appeals, could only find two New York cases to support his interpretation of the contract, as opposed to the many cases cited by the petitioner in his brief, and that the Appellate Division, Second Department of the State of New York, subsequently interpreted the identical clause with the opposite result, petitioner submits that the decision of the Eastern District Court as affirmed by the Court of Appeals is directly contrary to the prevailing New York Law, which is controlling, as stated in Judge Hand's opinion.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GUY O. WALSER,
Attorney for Petitioner.

SORENSON & MILLER,
Of Counsel.